



## **IN THE COURT OF CRIMINAL APPEALS OF TEXAS**

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**NO. WR-93,812-01**

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**In Re State of Texas Ex Rel. KIM OGG, Relator**

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**ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS  
AND EMERGENCY PETITION FOR WRIT OF MANDAMUS  
HARRIS COUNTY**

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*Per curiam.*

### **ORDER**

We have before us a motion for leave to file a petition for a writ of mandamus and the associated petition for a writ of mandamus. We now file and set the case for submission.

In November 1993, a jury convicted real party in interest, Arthur Brown Jr., of a June 1992 capital murder. *See* TEX. PENAL CODE § 19.03(a). Based on the jury's answers

to the special issues submitted pursuant to Texas Code of Criminal Procedure article 37.071, the trial court sentenced Brown to death. This Court affirmed Brown's conviction and sentence on direct appeal. *Brown v. State*, No. AP-71,817 (Tex. Crim. App. Dec. 18, 1996) (not designated for publication). We also denied relief on Brown's initial post-conviction writ of habeas corpus application. *Ex parte Brown*, No. WR-26,178-02 (Tex. Crim. App. June 18, 2008) (not designated for publication).

Brown filed a subsequent writ application in the trial court on November 3, 2014, and it was forwarded to this Court. We remanded one claim to the trial court. After the case was returned to this Court, we denied relief on the remanded claim and dismissed the rest. *Ex parte Brown*, No. WR-26,178-03 (Tex. Crim. App. Oct. 18, 2017) (not designated for publication).

On April 6, 2022, Relator filed in the trial court a proposed order setting an execution date. If signed by Respondent, the Honorable Natalia Cornelio, Judge of the 351<sup>st</sup> District Court, Relator's order would have set an August 31, 2022, execution date for Brown. Brown filed a pleading opposing the setting of an execution date, stating, among other things, that "setting a date at this time is premature because there are several potentially unexhausted meritorious claims that would preclude Mr. Brown's execution."

In a hearing on whether to sign the proposed order to set Brown's execution, Respondent said that she had reviewed the parties' pleadings and that she would not sign the order. Instead, she stated that she would appoint counsel for Brown because his

pleading opposing the setting of an execution date indicated that Brown “is going to file a [subsequent] writ and needs a new lawyer.”

Relator thereafter filed the pleading currently before us. Before issuing a decision on Relator’s motion for leave to file, this Court asked for a response from Respondent. We thereafter received responses from Respondent, Brown, and Relator.

In her response, Respondent conceded that the setting of an execution date is ministerial. However, she also stated that she could find no authority requiring her to set a date by a certain time. She noted that the only authority she could find stated that she could not set a date *before* certain events were complete. Finally, she noted that the law was “evolving in the area of intellectual disability,” which Brown asserts is applicable to him.

This month marks thirty years since this crime was committed. Texas Code of Criminal Procedure Article 43.141 says that an execution date should not be set before certain events are complete (that is, the conclusion of direct appeal and initial state habeas). Those events are complete and have been for years. Mandate issued on direct appeal in this case in December 2008. And the basis for an intellectual disability claim arose with the United States Supreme Court’s opinion in *Atkins v. Virginia* in 2002, yet Brown has never raised such a claim. *See Atkins*, 536 U.S. 304 (2002).

It is not disputed that a trial court has a ministerial duty to carry out a sentence imposed. It is also not disputed that the events that are required to be completed before a

death-sentenced defendant can be set for execution are complete. Although a trial court is not required to set an execution date immediately upon the completion of those events, a question remains as to how broad a trial court's discretion is in deciding when to set an execution date. Related to this is the question of whether the setting of an execution date may be delayed on the basis of a defendant's investigation of claims not pending in any court.<sup>1</sup>

Before we rule on the mandamus petition, we would like the parties to brief the issue of the breadth of the trial court's discretion and whether the exercise of that discretion becomes unreasonable at some point. Briefs are due within 45 days of the date of this order.

IT IS SO ORDERED THIS THE 29TH DAY OF JUNE, 2022.

Do Not Publish

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<sup>1</sup> In her statement regarding why she was not signing Relator's order setting an execution date, Respondent noted that Brown, in his pleading opposing the setting, indicated that he was "going to file a [subsequent] writ." However, Brown's pleading primarily discussed the need to *investigate* several claims. Whether any of that *investigation* would result in the filing of a subsequent writ application is only speculation at this point.